STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2014
v	No. 314481 Berrien Circuit Court
DONOVAN TERRELL PUGH, Defendant-Appellant.	LC No. 2012-001729-FC

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his convictions of two counts of armed robbery, MCL 750.529; one count of possession of a firearm during the commission of a felony, MCL 750.227b; and one count of receiving and concealing stolen property, MCL 750.535(4)(a). The trial court sentenced defendant to 180 to 674 months' imprisonment for the two armed robbery convictions, 24 months' imprisonment for the felony firearm conviction, to be served consecutive to the armed robbery sentences, and 242 days imprisonment for the receipt of stolen property conviction, with credit for time served. We affirm.

Defendant's convictions arose out of an altercation with Robert Williams and Deontray Calhoun, who were in a vehicle parked outside Calhoun's home. Two assailants wearing dark clothing and black masks with cutout eyeholes approached the vehicle and demanded money. One of the assailants was holding a gun. Williams gave the individuals his iPhone, a second cellular telephone, an unspecified amount of money, and the keys to his vehicle. As the assailants ran, Williams noticed a third, unmasked individual who had been standing off in the distance run away with the other two. Williams called his girlfriend and told her to track his iPhone using a mobile application called "Find my iPhone," and he then called 911. Using the tracking information that Williams' girlfriend was giving them, police located a Ford Escape. As police stopped the vehicle, two occupants, including defendant, exited the vehicle and ran. Defendant was later found by police hiding under a porch; he was in possession of Williams' iPhone. Defendant told police he had purchased the iPhone on the street from an unknown individual. A black mask with cutout eyeholes was found in the roadway near where the vehicle was stopped. Williams testified at trial that the mask was similar to the one used in the robbery, and DNA analysis indicated that defendant could not be excluded as a donor of the DNA found on the mask. Williams' other cellular telephone was found in the rear seat of the Ford Escape.

At trial, defendant's theory was that he merely purchased the iPhone and was not involved in the armed robbery.

On appeal, defendant first argues that he was entitled to a missing witness instruction with regard to Calhoun and another witness, Steve Green, both of whom were endorsed witnesses. Defendant also argues that the trial court erred in finding the prosecution showed due diligence in procuring these witnesses for trial. Defendant also asserts that the failure to produce these witnesses at trial violated his constitutional right to confrontation. We disagree.

We review a trial court's decision regarding due diligence and the appropriateness of a missing witness instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). A prosecutor who endorses a witness must use due diligence to produce that witness at trial. *Id*. at 388. If the prosecution fails to show due diligence in locating and serving a witness, the defendant may be entitled to a missing witness instruction, which allows a fact-finder to infer that the missing witness' testimony would have been unfavorable to the prosecution's case. *Id.*

The record demonstrates that Michael Clark, an officer with the Benton Harbor Department of Public Safety, made numerous efforts in the weeks leading up trial to locate both Calhoun and Green, to no avail. As to Calhoun, Clark testified that he was previously able to locate and serve Calhoun for a related case. At that time, Calhoun told Clark he had no interest in being involved. However, no subpoenas had been issued in relation to the instant case, and ultimately, the related case never went to trial. Thus, it was unclear whether Calhoun would in fact fail to appear. In any event, Clark testified that he made at least four attempts to locate Calhoun at his residence and at another address Calhoun was known to frequent, spoke with Calhoun's family members, kept a lookout for Calhoun's vehicle, and asked other officers to do so as well. Additionally, Clark checked the Law Enforcement Information Network (LEIN), as well as various county websites, to verify whether Calhoun was incarcerated.

Regarding Green, Clark testified that he spoke with Green on the night of the robbery, and Green provided a Michigan ID containing an address in Benton Township. Green also gave Clark the address of a residence in South Bend, Indiana, and a cellular telephone number. Upon checking the Benton Township address, Clark discovered Green had not lived there in at least one year. Moreover, Green stopped answering his cellular telephone, and eventually the service to that telephone was shut off. Clark enlisted the help of the South Bend police department to check the address Green had given him and was informed that address did not exist in South Bend. Clark expanded the search to all of Saint Joseph County, Indiana, but again found no residence matching the address given. Clark checked another address Green was known to frequent and spoke with family members, all to no avail.

We conclude that the record supports that there were diligent attempts to produce both Calhoun and Green for trial, and therefore the trial court did not abuse its discretion when it refused to issue the missing witness instruction.

Defendant's other argument, that he was denied his constitutional right of confrontation, also lacks merit. "[T]he right of confrontation is concerned with a specific out-of-court statement, i.e., the statements of 'witnesses,' those people who bear testimony against a

defendant." *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011), quoting *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354; 158 L Ed 2d 177 (2004). There is no indication in this case that the prosecution introduced into evidence any prior testimonial statements from Calhoun or Green. Thus, because neither Calhoun nor Green "b[ore] testimony" against defendant, *Fackelman*, 489 Mich at 528, they were not witnesses for purposes of the Confrontation Clause, and that constitutional right was not implicated by the prosecution's failure to produce them at trial.

Defendant next argues that the trial court erred in allowing testimony from Williams regarding an out-of-court identification of defendant. Defendant maintains that the out-of-court identification procedure was impermissibly suggestive. He also argues that the case should be remanded to allow the trial court to determine whether there was an independent basis for Williams' in-court identification of defendant. In addition, he argues that his trial counsel was ineffective for failing to object to this testimony at trial. Because the evidentiary issue was not preserved at trial, we review the issue for plain error affecting substantial rights. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Additionally, because defendant failed to move for a new trial or, in the alternative, a *Ginther*[1] evidentiary hearing regarding his claim of ineffective assistance of counsel, our review of this issue is limited to mistakes apparent in the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

A pretrial identification procedure violates a defendant's right to due process of law when, under the totality of the circumstances, it is "so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). "[A]n improper suggestion often arises when the witness[,] when called by the police or prosecution[,] either is told or believes that the police have apprehended the right person" or "when the witness is shown only one person[,] or a group in which one person is singled out in some way," such that the witness "is tempted to presume that he is the person." *Gray*, 457 Mich at 111 (internal quotations and citation omitted).

We conclude that the admission at trial of Williams' testimony regarding the out-of-court identification was error. The record indicates that following the armed robbery Williams could not give any type of description of the assailants to the 911 operator. Further, Williams could only tell the responding police officer that the assailants were wearing dark clothing. After the police apprehended defendant, they took him to the Benton Harbor police station for questioning. Williams then went to the station and was asked to identify defendant as a possible suspect. Williams was told by police that they had someone in custody and that the person in custody had been found in possession of Williams' iPhone. Williams thereafter viewed defendant, who was sitting in an interview room, and identified him as the individual who did not have a gun during the robbery. Given the totality of the unique circumstances of this case, especially Williams' inability to give any meaningful description of his assailants immediately following the robbery, the display of defendant in an interview room, the statement by police that defendant was the

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

man found in possession of Williams' iPhone, and the lack of an independent basis for Williams' in-court identification of defendant, we are compelled to deem the identification procedure in this case improper. See *Gray*, 457 Mich at 111.

Notwithstanding the above conclusion, we find that reversal is not warranted in this case. To warrant reversal under the plain error standard, a defendant must show that the plain error affected his substantial rights; that is, "that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763-764. Defendant cannot do so in this case. First, it is apparent from the record that any prejudicial effect resulting from Williams' identification of defendant as the perpetrator was minimized by his defense counsel's rigorous cross-examination of Williams regarding his initial description of the assailants and the subsequent identification procedure that took place at the police station. Thus, the jury was well aware of the problems associated with Williams' identification of defendant. Moreover, while Williams' identification of defendant was the only direct evidence linking him to the armed robbery, we find the other, circumstantial evidence in this case was strong and sufficient to support defendant's convictions. Circumstantial evidence, along with the reasonable inferences drawn therefrom, can be sufficient to support a conviction. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

In this case, the evidence established that defendant was in the Ford Escape after the armed robbery occurred. Moreover, when defendant was later found hiding under a porch, he was in possession of Williams' stolen iPhone. See *People v Hayden*, 132 Mich App 273, 283 n 4; 348 NW2d 672 (1984) ("It is well established that the jury may infer that the possessor of recently stolen property was the thief"). Finally, a black mask with eye holes cut out, which Williams testified was similar to the one used during the robbery, was found in the roadway near where the Ford Escape was stopped by police. Defendant could not be excluded as a donor of DNA found on that mask. It was reasonable for the jury to infer from all of this evidence that defendant was involved in the armed robbery. Accordingly, defendant cannot demonstrate that the out-of-court identification of defendant by Williams affected the outcome of the trial, and reversal is not warranted. *Carines*, 460 Mich at 763-764.

Defendant's claim of ineffective assistance of counsel also lacks merit. To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that (1) his defense counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To show deficient performance, defendant must show that his counsel's representation fell "below an objective standard of reasonableness under prevailing professional norms." *Pickens*, 446 Mich at 303. Correspondingly, to show prejudice, defendant must show that his counsel's deficient performance undermined the reliability of the verdict; that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 314. Counsel is presumed to have provided effective assistance, and defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. *Sabin (On Second Remand)*, 242 Mich App at 659.

In this case, defendant cannot overcome the strong presumption that his counsel's failure to object to the identification testimony constituted sound trial strategy. As noted, defendant's counsel vigorously cross-examined Williams regarding his inability to describe the assailants

following the robbery, as well as his subsequent identification of defendant at the police station, all of which tended to undermine Williams' credibility. The goal of undermining Williams' testimony fits within the range of possible reasons why defense counsel chose not to object to the identification testimony at trial. Thus, defense counsel's actions fell within a range of reasonable professional conduct, and defendant cannot establish that his performance was deficient. *Pickens*, 446 Mich at 303. Moreover, defendant cannot show that, but for counsel's failure to object, the outcome of trial would have been different. Accordingly, defendant's claim of ineffective assistance of counsel fails.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro